

1984

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Recommended Citation

Susan Marble, *Is the Privacy Act an Exemption 3 Statute and Whose Statute is it Anyway?*, 52 Fordham L. Rev. 1334 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol52/iss6/32>

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IS THE PRIVACY ACT AN EXEMPTION 3 STATUTE AND WHOSE STATUTE IS IT ANYWAY?

INTRODUCTION

Since the enactment of the Privacy Act¹ in 1974, commentators have recognized its potential for conflict with the Freedom of Information Act (FOIA)² disclosure provisions.³ Both statutes provide for disclosure of government records:⁴ The Privacy Act grants the subject of the record (first-party requester) access to information about himself;⁵ the FOIA mandates disclosure to the public.⁶ A major dispute centers on whether Privacy Act disclosure exemptions may be incorporated into the FOIA automatically to bar disclosure under the FOIA.⁷ If so, a further question arises as to whether the incorporated Privacy Act exemptions should be applied only to individuals requesting information about themselves, or to all persons requesting information under the FOIA. Conversely, if Privacy Act exemptions are not incorporated into the FOIA, the issue must still be resolved whether individuals are limited to Privacy Act access provisions.

1. Pub. L. No. 93-579, 88 Stat. 1896 (1974) (codified as amended at 5 U.S.C. § 552a (1982)).

2. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

3. See 120 Cong. Rec. 40,406 (1974) (remarks of Sen. Ervin); J. O'Reilly, *Federal Information Disclosure* § 20.13 (1977); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1336 (1975) [hereinafter cited as *Government Information*]; Note, *The Privacy Act of 1974: An Overview*, 1976 Duke L.J. 301, 312-13; Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 628-29 & n.152 (1976) [hereinafter cited as *Privacy Exemption*]; Note, *FOIA and Privacy Act Interface: Toward a Resolution of Statutory Conflict*, 8 Loy. U. Chi. L.J. 570, 590-92 (1977) [hereinafter cited as *Statutory Conflict*]; Note, *An Introduction to The Federal Privacy Act of 1974 And Its Effect On The Freedom of Information Act*, 11 New Eng. L. Rev. 463, 487-93 (1976).

4. See 5 U.S.C. § 552(a) (1982) (government agencies to publish or make available their records); *id.* § 552a(d) (government agencies to make available their records).

5. *Id.* § 552a(d). Review and copying to be permitted "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system." *Id.* § 552a(d)(1).

6. *Id.* § 552(a). Public disclosure encompasses making records available to "any person" who requests them. See *id.* § 552(a)(3).

7. Compare *Shapiro v. DEA*, 721 F.2d 215, 223-24 (7th Cir. 1983) (exemption under Privacy Act bars disclosure under FOIA because of FOIA's Exemption 3), *cert. granted*, 104 S. Ct. 1706 (1984) and *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980) (same) and *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (The FOIA cannot disclose information exempt under Privacy Act), *cert. denied*, 444 U.S. 1013 (1980) with *Provenzano v. United States Dep't of Justice*, 717 F.2d 799, 800 (3d Cir. 1983) (*per curiam*) (exemption under Privacy Act does not bar disclosure under

The FOIA, enacted in 1966,⁸ requires disclosure unless the requested information falls into one of nine exempted categories.⁹ The third of these categories (Exemption 3)¹⁰ exempts from the FOIA's disclosure requirement material that other statutes specifically require to be withheld.¹¹ If the Privacy Act is an Exemption 3 statute, material that is exempt from disclosure under the Privacy Act would also be exempt from disclosure under the FOIA.¹²

FOIA), *cert. granted*, 104 S. Ct. 1706 (1984) and *Porter v. United States Dep't of Justice*, 717 F.2d 787, 799 (3d Cir. 1983) (same) and *Greentree v. United States Customs Serv.*, 674 F.2d 74, 75 (D.C. Cir. 1982) (same); *see also* *Duffin v. Carlson*, 636 F.2d 709, 711 (D.C. Cir. 1980) (dictum) (questioning whether exemption under Privacy Act forecloses disclosure determination under the FOIA); Case Comment, *Greentree v. United States Customs Service: A Misinterpretation of the Relationship Between FOIA Exemption 3 and the Privacy Act*, 63 B.U.L. Rev. 507, 531 (1983) (exemption under Privacy Act bars disclosure under FOIA by operation of FOIA's Exemption 3) [hereinafter cited as *Misinterpretation*]; Note, *Administrative Law—Privacy Act Exemption (j)(2) Does Not Specifically Preclude Disclosure of Information Within Meaning of Exemption (3) of the Freedom of Information Act—Greentree v. United States Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), 56 Temp. L.Q. 127, 132-33 (1983) (exemption under Privacy Act does not bar disclosure under FOIA) [hereinafter cited as *Privacy Act*]. The Supreme Court has granted certiorari on this question. *Shapiro v. DEA*, 721 F.2d 215 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Provenzano v. United States Dep't of Justice*, 717 F.2d 799 (3d Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984).

8. Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

9. 5 U.S.C. § 552(b) (1982) (listing nine exemptions); *see* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 700 (D.C. Cir. 1982), *vacated as moot*, 104 S. Ct. 418 (1983); *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971).

10. 5 U.S.C. § 552(b)(3) (1982).

11. Exemption 3 exempts disclosure of materials that are:

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Id.; *see, e.g.*, *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983); *Medina-Hincapie v. United States Dep't of State*, 700 F.2d 737, 740-42 (D.C. Cir. 1983); *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 701-03 (D.C. Cir. 1982), *vacated as moot*, 104 S. Ct. 418 (1983); *Fund for Constitutional Gov't v. National Archives*, 656 F.2d 856, 867-68 (D.C. Cir. 1981); *Church of Scientology v. United States Postal Serv.*, 633 F.2d 1327, 1333 (9th Cir. 1980); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 827-28 (D.C. Cir. 1979); *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Irons & Sears v. Dann*, 606 F.2d 1215, 1219-21 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980); *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 614 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *American Jewish Congress v. Kreps*, 574 F.2d 624, 629-30 (D.C. Cir. 1978).

12. *See* *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983) (exemption under the Privacy Act bars disclosure under the FOIA because of FOIA's Exemption 3), *cert.*

The Privacy Act was enacted to protect individuals from the gathering and dissemination of personal information by the federal government.¹³ While the FOIA also protects individuals' privacy interests,¹⁴ an individual's rights under the Privacy Act are broader than those of the general public under the FOIA.¹⁵ The Privacy Act, however,

granted, 104 S. Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980) (same); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (exemption under the Privacy Act bars disclosure under the FOIA), *cert. denied*, 444 U.S. 1013 (1980); *Misinterpretation*, *supra* note 7, at 531 (same). *But see* *Provenzano v. United States Dep't of Justice*, 717 F.2d 799, 800 (3d Cir. 1983) (*per curiam*) (exemption under the Privacy Act does not bar disclosure under the FOIA), *cert. granted*, 104 S. Ct. 1706 (1984); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 799 (3d Cir. 1983) (same); *Greentree v. United States Customs Service*, 674 F.2d 74, 75 (D.C. Cir. 1982) (same); *Privacy Act*, *supra* note 7, at 132-33 (Privacy Act is not an Exemption 3 statute); *see also* *Duffin v. Carlson*, 636 F.2d 709, 711 (D.C. Cir. 1980) (*dictum*) (questions whether exemptions under Privacy Act forecloses disclosure determination under the FOIA).

13. *See* 5 U.S.C. § 552a(b), (d)(2), (e) (1982); Privacy Act of 1974, Pub. L. No. 93-579, § 2(a), 88 Stat. 1896, 1896. The Privacy Act was intended to protect citizens from governmental invasions of personal privacy. S. Rep. No. 1183, 93d Cong., 2d Sess. 1 (1974) [hereinafter cited as 1974 Senate Report], *reprinted in* 1974 U.S. Code Cong. & Ad. News 6916, 6916; H.R. 16373, 93d Cong., 2d Sess., *reprinted in* 120 Cong. Rec. 36,643 (1974); *see* *Antonelli v. FBI*, 536 F. Supp. 568, 572 (N.D. Ill. 1982); *Florida Medical Ass'n, Inc. v. HEW*, 479 F. Supp. 1291, 1305-06 (M.D. Fla. 1979).

14. 5 U.S.C. § 552(b)(6), (7) (1982). The FOIA's privacy protections exempt personnel or medical files disclosure of which would constitute an "unwarranted invasion of personal privacy," *id.* § 552(b)(6), and investigatory records if their disclosure would constitute an "invasion of personal privacy," *id.* § 552(b)(7)(C). These protections supercede those of the Privacy Act. *Id.* § 552a(b)(2); *see* *Crooker v. United States Parole Comm'n*, No. 83-1687, slip op. at 20-21 (1st Cir. Mar. 21, 1984); *Jafari v. Department of the Navy*, No. 83-1629, slip op. at 4-6 (4th Cir. Feb. 7, 1984); *Tennessee Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975); *Privacy Exemption*, *supra* note 3, at 629-30. One court has noted that "the Privacy Act was not intended to override the FOIA and in operation only prohibits the release of information not covered by the FOIA or the discretionary release of material which, while exempt from the FOIA, the agency might have previously chosen to release." *Antonelli v. FBI*, 536 F. Supp. 568, 572 (N.D. Ill. 1982); *see* *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir. 1981); *Florida Medical Ass'n v. HEW*, 479 F. Supp. 1291, 1306 (M.D. Fla. 1979).

15. Under the Privacy Act, an individual has a right of access, 5 U.S.C. § 552a(d)(1) (1982), and a right to request amendment of his record; *id.* § 552a(d)(2), (3), (4). The FOIA requester only has a right of access. *Id.* § 552(a). Additionally, the Privacy Act imposes agency requirements in the maintenance, collection and dissemination of personal records. *Id.* § 552a(e). The FOIA imposes no similar requirements. *See id.* § 552. Although both the Privacy Act and the FOIA provide for *de novo* judicial review of agency withholding decisions and grant attorney fees and litigation costs if the requester "substantially prevail[s]," *id.* § 552a(g) (Privacy Act civil remedy), (g)(2)(B) (Privacy Act attorney fees and litigation costs); *id.* § 552(a)(4)(B) (FOIA civil remedy), (a)(4)(E) (FOIA attorney fees and litigation costs), only the Privacy Act grants damages to the individual if the agency intentionally or willfully violates the Privacy Act provisions, *id.* § 552a(g)(4).

permits exemption from disclosure of certain specified types of records without regard to the actual contents of the record requested.¹⁶ CIA records, for example, are completely exempt from disclosure under the Privacy Act.¹⁷ The FOIA, on the other hand, contains more flexible exemptions that are applicable only when disclosure of a particular record¹⁸ would bring about specific dangers identified by Congress.¹⁹ CIA records, then would be withheld only to the extent that disclosure would pose one of the dangers identified in the exemptions to the FOIA.²⁰ Thus, in some instances the FOIA will provide greater access than will the Privacy Act.²¹ Further, if the enact-

The Privacy Act was meant to protect individuals from governmental invasions of privacy by increasing government accountability and responsibility. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 794 (3d Cir. 1983); 1974 Senate Report, *supra* note 14, at 1, reprinted in 1974 U.S. Code Cong. & Ad. News at 6916; H.R. 16,373, 93d Cong., 2d Sess., reprinted in 120 Cong. Rec. 36,643 (1974). The rights granted by the Privacy Act to the individual implement this congressional intent. *Porter*, 717 F.2d at 794; 5 U.S.C. § 552a note (1982) (Congressional Findings and Statement of Purposes); 120 Cong. Rec. 36,897 (1974) (remarks of Sen. Muskie).

16. The Privacy Act allows the exemption of entire systems of records. 5 U.S.C. § 552a(j), (k) (1982). If the system of records is exempt by virtue of a blanket exemption, inquiry into the nature of the requested file is not required. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-29 (1978); *Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974). In order to exempt a system of records, the agency must first promulgate and publish rules, giving reasons for the exemption. 5 U.S.C. § 552a(j), (k) (1982); see *Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984). Thus, the decision to exempt a system of records must be made prior to a request for files within that system in order for the exemption to be valid. See *id.*

17. 5 U.S.C. § 552a(j)(1) (1982). See *infra* notes 68, 69 and accompanying text.

18. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (blanket exemptions do not apply to FOIA, although "generic" determination of harm as specified by Congress is proper).

19. Investigatory records compiled for law enforcement proceedings, for example, are exempt under the FOIA only to the extent that they:

(A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7) (1982). This provision (Exemption 7) was amended to prevent blanket exemption for all investigative records. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978). See *infra* notes 96, 97 and accompanying text.

20. See *infra* notes 70-77 and accompanying text.

21. *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 795 (3d Cir.

ment of the Privacy Act signals the demise of individuals' access under the FOIA,²² the occasional greater FOIA access could disclose to any other member of the public information unavailable to the subject of the file.²³

In an attempt to determine whether the Privacy Act is an Exemption 3 statute or may otherwise bar disclosure under the FOIA, courts and commentators have repeatedly analyzed the statutory language and legislative history of the two acts.²⁴ The contradictory conclusions of these analyses²⁵ indicate that neither the statutory language nor the legislative history is conclusive.²⁶ Further, these analyses fail to distinguish the secondary issue—whether, if the Privacy Act is not an Exemption 3 statute, the same result nonetheless may be achieved by limiting individuals to Privacy Act disclosure provisions when they request information about themselves. In order to resolve the primary dispute it is also necessary to resolve the secondary issue, going beyond traditional methods of statutory construction to an analysis of the operation of the two statutes.

Part I of this Note briefly presents the alternative analyses, both of which utilize traditional methods of statutory construction—interpretation of statutory language and legislative history. Part II discusses

1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-80 (D.C. Cir. 1982). Compare 5 U.S.C. § 552a(j), (k) (1982) (blanket exemption) with *id.* § 552(b)(7) (exemption only for enumerated categories). The Privacy Act, for example, completely exempts CIA records, *id.* § 552a(j)(1), and all other personal information records maintained by criminal law enforcement agencies, *id.* § 552a(j)(2). The FOIA would exempt these same materials only to the extent that they would harm the Government. S. Rep. No. 813, 89th Cong., 1st Sess. (1965), reprinted in Senate Comm. on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book 44 (Comm. Print 1974); see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); 120 Cong. Rec. 17,033 (1977) (remarks of Sen. Hart).

22. See *infra* notes 101, 102 and accompanying text.

23. See *infra* note 61 and accompanying text.

24. See, e.g., *Shapiro v. DEA*, 721 F.2d 215, 218-22 (7th Cir. 1983), cert. granted, 104 S. Ct. 1706 (1984); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 793-99 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81-84 (D.C. Cir. 1982); *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980); *Terkel v. Kelly*, 599 F.2d 214, 215-16 (7th Cir. 1979); *Government Information*, *supra* note 3, at 1336-40; *Misinterpretation*, *supra* note 7, at 516-26; *Privacy Exemption*, *supra* note 3, at 624-28; *Statutory Conflict*, *supra* note 3, at 590-92; *Privacy Act*, *supra* note 7, at 140-49.

25. Judicial acceptance of both analyses has led to an ongoing split in circuit court opinions. See *supra* note 7.

26. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983) ("There is a certain amount of ambiguity in the legislative history of the Privacy Act, with statements by members of Congress in which each side purports to find support."); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81 (D.C. Cir. 1982) ("[T]he legislative history is not without ambiguities."); *Privacy Act*, *supra* note 7, at 146 (Neither the Privacy Act nor the FOIA show "Congress at its best in documenting the contours and boundaries of the legislation.").

the operation of the two statutes under the alternative analyses. First, it examines the Privacy Act as an Exemption 3 statute, distinguishing between its application to either first-party requesters only, or to all requesters. Second, it examines the operation of the Privacy Act as an independent statute, distinguishing between limiting first-party access to Privacy Act provisions and allowing first-party requesters to utilize FOIA access provisions as well. This Note concludes that the FOIA and the Privacy Act operate most efficiently as independent statutory frameworks and that first-party access should not be limited to Privacy Act provisions.

I. THE ALTERNATIVE STATUTORY ANALYSES

A. *The Privacy Act: An Exemption 3 Statute*

The FOIA's Exemption 3 allows non-disclosure of records specifically exempted from disclosure by other statutes.²⁷ Congress included this exemption to reconcile the FOIA with the withholding statutes already in existence.²⁸ Post-FOIA statutes, such as the Privacy Act, also must be reconciled with the FOIA.²⁹ Indeed, Congress recognized the potential for overlap between the Privacy Act and the FOIA.³⁰ The original Senate version of the Privacy Act³¹ contained two distinct provisions that would have reconciled the Privacy Act with the FOIA: (1) exemption under the Privacy Act will not impair FOIA disclosure,³² and (2) exemption under the FOIA will not impair Privacy Act disclosure.³³ As enacted, however, the Privacy Act contains only the second provision.³⁴ Because Congress omitted the provision prohibiting use of Privacy Act exemptions to impair FOIA disclosure, it may be inferred that Congress rejected this prohibition.³⁵ A determination

27. See *supra* note 11.

28. Exemption 3 was intended to reconcile other withholding statutes with the FOIA, as "[t]here are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified" H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2418, 2427; see *FAA v. Robertson*, 422 U.S. 255, 263-65 (1975); *Government Information*, *supra* note 3, at 1338-39.

29. See *King v. IRS*, 688 F.2d 488, 495 (7th Cir. 1982); *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 707 (D.C. Cir. 1982) (Scalia, J., statement on denial of rehearing), *vacated as moot*, 104 S. Ct. 418 (1983); *Government Information*, *supra* note 3, at 1337-40; Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum. L. Rev. 1029, 1029 n.5 (1976).

30. See 120 Cong. Rec. 40,406 (1974).

31. S. 3418, 93d Cong., 2d Sess., 120 Cong. Rec. 36,917-21 (1974).

32. See *id.* § 205(b), 120 Cong. Rec. at 36,920.

33. See *id.* § 205(a), 120 Cong. Rec. at 36,920.

34. 5 U.S.C. § 552a(q) (1982); see 120 Cong. Rec. 40,400-05 (1974).

35. See *Shapiro v. DEA*, 721 F.2d 215, 221 (7th Cir. 1983), *cert. granted*, 104 S.

that the Privacy Act is an Exemption 3 statute impairs disclosure under the FOIA, and thus is consistent with this implied legislative intent.

Withholding statutes must meet one of two criteria before they fall within Exemption 3.³⁶ The statute must either leave no room for agency discretion in the withholding of the information, or "[establish] particular criteria for withholding or [refer] to particular types of matters to be withheld."³⁷ The Privacy Act does not satisfy the first criterion because its exemptions are solely at the discretion of the agency.³⁸ The second criterion, however, has been the basis for holding the Privacy Act an Exemption 3 statute³⁹ because the act "refers to particular types of matters to be withheld."⁴⁰

Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980); *Misinterpretation*, *supra* note 7, at 525-26; *see also* 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 48.18 (4th ed. 1973) (omission of a provision from a bill weakens a judgment that Congress intended the inclusion of the omitted provisions). *But see* *Porter v. United States Dep't of Justice*, 717 F.2d 787, 794 (3d Cir. 1983) (The "plain language of section 552a(b)(2) is that the prohibition on disclosure in the Privacy Act is inapplicable to Freedom of Information Act requests."); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982) ("section (b)(2) of the Privacy Act represents a Congressional mandate that the Privacy Act *not* be used as a barrier to FOIA access.").

36. 5 U.S.C. § 552(b)(3) (1982). Subsections (A) and (B) of Exemption 3 are distinct from one another and only one need be satisfied. *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978); *see* 122 Cong. Rec. 24,212-13 (1976) (colloquy between Representatives McCloskey and Fascell); 122 Cong. Rec. 24,181 (1976) (remarks of Rep. Abzug); H.R. Rep. No. 1441, 94th Cong., 2d Sess. 14 (1976) (conference report), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2244, 2250.

37. 5 U.S.C. § 552(b)(3) (1982).

38. *Misinterpretation*, *supra* note 7, at 554 n.155. The Privacy Act's exemptions are permissive: "The head of any agency *may* promulgate rules . . . to exempt any system of records within the agency . . ." 5 U.S.C. § 552a(j), (k) (1982) (emphasis added). The first prerequisite "is too rigorous to tolerate any decisionmaking on the administrative level." *American Jewish Congress v. Kreps*, 574 F.2d 624, 628 (D.C. Cir. 1978).

39. *See* *Shapiro v. DEA*, 721 F.2d 215, 219 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 689-91 (5th Cir. 1980); *cf.* *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (no express holding that Privacy Act is Exemption 3 statute; FOIA cannot disclose information that Privacy Act exempts), *cert. denied*, 444 U.S. 1013 (1980). The Privacy Act exempts CIA records, 5 U.S.C. § 552a(j)(1) (1982), law enforcement investigatory records maintained by agencies performing law enforcement functions, *id.* § 552a(j)(2), classified state secrets, *id.* § 552a(k)(1), law enforcement investigatory material not held by law enforcement agencies, except that the material will be provided to an individual if he would otherwise be deprived of "any right, privilege, or benefit" if disclosure would not reveal the identity of a confidential source who furnished information to the government under a promise of confidentiality, *id.* § 552a(k)(2), information regarding providing protective services to the President of the United States, *id.* § 552a(k)(3), statistical information required by statute to be used only as such, *id.* § 552a(k)(4),

If the Privacy Act is not an Exemption 3 statute, the FOIA may provide access to information that is exempt under the Privacy Act and thereby limit the efficacy of the Privacy Act's exemptions.⁴¹ The

investigatory material regarding qualifications for Federal civilian employment, military service, Federal contracts or access to classified information, to the extent that disclosure would reveal a confidential source, *id.* § 552a(k)(5), materials for the testing of qualification for appointment or promotion in Federal service to the extent that disclosure would prejudice fairness of the testing process, *id.* § 552a(k)(6), and armed services evaluational material to the extent that disclosure would reveal the identity of a confidential source, *id.* § 552a(k)(7).

40. 5 U.S.C. § 552(b)(3)(B) (1982). An Exemption 3 statute, however, also may be required to establish criteria by which information is to be withheld. *See* Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 701-03 (D.C. Cir. 1982), *vacated as moot*, 104 S. Ct. 418 (1983); Irons & Sears v. Dann, 606 F.2d 1215, 1220-21 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1075 (1980); American Jewish Congress v. Kreps, 574 F.2d 624, 628-29 (D.C. Cir. 1978). The Privacy Act does not establish criteria for withholding; its exemptions are at the discretion of the agency. *See* 5 U.S.C. § 552a(j) (1982); *cf.* Church of Scientology v. United States Postal Serv., 633 F.2d 1327, 1333 (9th Cir. 1980) (Postal Service withholding provision does not satisfy Exemption 3 because it allows complete discretion to disclose or withhold all investigatory files). One commentator has suggested that identifying materials in the statute is sufficient to establish a method by which agencies are to exercise discretion in withholding information. *Misinterpretation*, *supra* note 7, at 524 n.155. This reasoning, however, is flawed. *See* Washington Post Co. v. United States Dep't of Justice, 685 F.2d 698, 702 (referring to particular types of matters may not be enough; every withholding statute will refer to something), *vacated as moot*, 104 S. Ct. 418 (1983). Alternatively, a very narrow category indicates that Congress was aware of the dangers inherent in disclosing that particular type of information, and criteria for withholding were not necessary. *See* Washington Post Co. v. United States Dep't of State, 685 F.2d 698, 702 (D.C. Cir. 1982), *vacated as moot*, 104 S. Ct. 418 (1983); Founding Church of Scientology v. NSA, 610 F.2d 824, 827-28 (D.C. Cir. 1979); Lee Pharmaceuticals v. Kreps, 577 F.2d 610, 616-17 (9th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); American Jewish Congress v. Kreps, 574 F.2d 624, 630 (D.C. Cir. 1978); Sears v. Gottschalk, 502 F.2d 122, 127 (4th Cir. 1974), *cert. denied*, 422 U.S. 1056 (1975). Finally, a withholding statute may satisfy Exemption 3 if an examination of the statute and its legislative history reveals "congressional appreciation of the dangers" in disclosure. Founding Church of Scientology v. National Sec. Agency, 610 F.2d 824, 827-28 (D.C. Cir. 1979). The legislative history of the Privacy Act exemptions indicates that the identified files should not be disclosed to the subject of the files. *See infra* note 107 and accompanying text.

41. *See* Shapiro v. DEA, 721 F.2d 215, 222 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); Painter v. FBI, 615 F.2d 689, 690-91 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Misinterpretation*, *supra* note 7, at 527. Holding the Privacy Act an Exemption 3 statute, however, contravenes the Privacy Act's consent waiver, 5 U.S.C. § 552a(b)(2) (1982). *See* Porter v. United States Dep't of Justice, 717 F.2d 787, 797 (3d Cir. 1983); Greentree v. United States Customs Serv., 674 F.2d 74, 78-79 (D.C. Cir. 1982). The consent waiver is seen as preserving first-party FOIA "access to information for its own sake." Porter v. United States Dep't of Justice, 717 F.2d 787, 797 (3d Cir. 1983); Greentree v. United States Customs Serv., 674 F.2d 74, 79 (D.C. Cir. 1982). *Contra* Shapiro v. DEA, 721 F.2d 215, 220 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984).

scope of the investigatory records exemption under the Privacy Act, for example, was the subject of much debate,⁴² and was resolved in favor of an exemption broader than the corresponding FOIA exemption.⁴³ Greater deference, therefore, should be given the Privacy Act because it is the most recent expression of congressional intent.⁴⁴

B. *The Privacy Act: An Independent Statute*

Courts and commentators concluding that the Privacy Act is not an Exemption 3 statute rely heavily on the language and purpose of the Privacy Act.⁴⁵ The Privacy Act was intended to increase access by

42. See, e.g., *Access to Records: Hearings on H.R. 12206 and Related Bills before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 93d Cong., 2d Sess. 94-95 (1974); H.R. Rep. 1416, 93d Cong., 2d Sess. 18, 37-38 (1974), 120 Cong. Rec. 36,645, 36,961-62 (1974) (remarks of Rep. Abzug).

The Senate Committee proposed Privacy Act exemptions for investigatory records only if disclosure of the records would seriously impede the purposes for which the information was maintained. S. 3418, 93d Cong., 2d Sess. § 203(b), 120 Cong. Rec. 36,885, 36,888 (1974). The proposed exemption was amended to mirror that of the corresponding exemption under the FOIA, Exemption 7. *Id.* at 36,890, 36,920 (1974). This provision was ultimately rejected in favor of a blanket exemption. See *infra* note 43.

43. The compromise bill adopted by the Government Operations Committees of the House and Senate adheres to the broader House exemption and rejects the Senate proposal for an exemption resembling the FOIA's Exemption 7. 120 Cong. Rec. 40,400, 40,402 (1974). Compare 5 U.S.C. § 552(b)(7) (1982) (exempt if information falls within one of 9 categories) with *id.* § 552a(j)(2) (blanket exemption).

44. See *Shapiro v. DEA*, 721 F.2d 215, 222 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Duffin v. Carlson*, 636 F.2d 709, 711 (D.C. Cir. 1980) (dictum); *Painter v. FBI*, 615 F.2d 689, 690 (5th Cir. 1980); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Greentree v. United States Customs Serv.*, 515 F. Supp. 1145, 1148 (D.D.C. 1981), *rev'd*, 674 F.2d 74 (D.C. Cir. 1982).

45. See *Porter v. United States Dep't of State*, 717 F.2d 787, 796-99 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-84 (D.C. Cir. 1982); *Privacy Act*, *supra* note 7, at 152-56.

The FOIA contains a broad mandate for disclosure and its exemptions are to be narrowly construed. See, e.g., *Baldrige v. Shapiro*, 455 U.S. 345, 352-53 (1982) (FOIA embodies broad disclosure and narrow exemptions); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (dominant purpose of FOIA is disclosure); *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 700 (D.C. Cir. 1982) (FOIA embodies broad disclosure and narrow exemptions), *vacated as moot*, 104 S. Ct. 418 (1983); *Irons & Sears v. Dann*, 606 F.2d 1215, 1219 (D.C. Cir. 1979) (same), *cert. denied*, 444 U.S. 1075 (1980); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (same), *reprinted in* Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book* 36, 38 (Comm. Print 1974) [hereinafter cited as FOIA Source Book]. Early commentators concluded that the FOIA's policy of broad disclosure precluded the Privacy Act from being an Exemption 3 statute. See *supra* note 3 and accompanying text. Courts concluding that the Privacy Act is not an Exemption 3 statute have not considered whether the Privacy Act meets the requirements of Exemption 3. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797

individuals to information about themselves.⁴⁶ Congress' decision to limit such access with exemptions, however, does not necessarily reflect a desire to withhold this exempted information under the FOIA.⁴⁷ The Privacy Act and the FOIA should operate separately.⁴⁸

Moreover, several provisions contained in the Privacy Act preclude its operation as an Exemption 3 statute. The Privacy Act's disclosure exemptions apply only to persons seeking access under the Privacy Act,⁴⁹ and not to those seeking access under other statutes.⁵⁰ In addition, the Privacy Act's "Conditions of Disclosure" provision waives the consent requirement for required disclosures of personal information under the FOIA.⁵¹ This waiver arguably "reinstates the essence" of the provision omitted from the final version of the Privacy Act, providing

n.11 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982). See *infra* notes 49-54 and accompanying text.

46. *Painter v. FBI*, 615 F.2d 689, 690 (5th Cir. 1980); see *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81 (D.C. Cir. 1982); H.R. Rep. No. 16,373, 93d Cong., 2d Sess., 120 Cong. Rec. 36,643 (1974) (Privacy Act intended to increase government accountability and responsibility in protecting individuals' privacy); 1974 Senate Report, *supra* note 13, at 1, reprinted in 1974 U.S. Code Cong. & Ad. News at 6916, 6916-6917 (same); see also *Porter v. United States Dep't of Justice*, 717 F.2d 787, 798 (3d Cir. 1983) (no congressional intent for Privacy Act to limit access under the FOIA). The rights granted by the Privacy Act implement this governmental intent. See *supra* note 15 and accompanying text. The access requirement is important to enable an individual to monitor the information concerning him maintained by an agency. See 120 Cong. Rec. 36,897 (1974) (remarks of Sen. Muskie).

47. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81, 83, 88 (D.C. Cir. 1982); see also *Antonelli v. FBI*, 536 F. Supp. 568, 572 (N.D. Ill. 1982) ("Privacy Act was not intended to override the FOIA."), *rev'd on other grounds*, 721 F.2d 615 (7th Cir. 1983).

48. *Porter v. United States Dep't of Justice*, 717 F.2d 787, 798-99 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81, 88-89 (D.C. Cir. 1982); *Privacy Act*, *supra* note 7, at 160-61.

49. 5 U.S.C. § 552a(j), (k) (1982). Exemptions are made only from the provisions of "this section," *id.*, namely the Privacy Act.

50. *Id.*; see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982).

51. 5 U.S.C. § 552a(b)(2) (1982). Disclosure is required under the FOIA if the information does not fall within one of FOIA's exemptions, *id.* § 552(b) (specifying 9 exemptions). See *infra* note 62 and accompanying text. If the information falls within one of the exemptions, however, disclosure is not barred, because the FOIA is a disclosure statute—not a withholding statute. *Planning Research Corp. v. Federal Power Comm'n*, 555 F.2d 970, 973 & n.4 (D.C. Cir. 1977); *Charles River Park "A", Inc. v. HUD*, 519 F.2d 935, 942 (D.C. Cir. 1974). Thus, although the material is exempt under the FOIA, the agency has discretion to release it. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d 790, 800 (3d Cir. 1979) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979)), *aff'd*, 447 U.S. 102 (1980). It is this discretionary release of information that the Privacy Act would prohibit unless the subject of the file granted consent to its release. See *supra* note 14 and accompanying text.

that exemption under the Privacy Act would not affect FOIA disclosure.⁵² Congress noted that the waiver was intended to "preserve the status quo as interpreted by the courts regarding the disclosure of personal information under [the FOIA]."⁵³ Thus, the Privacy Act is not an Exemption 3 statute because the FOIA's disclosure provisions were to remain in effect, and the Privacy Act's exemptions are "self-contained."⁵⁴

These opposing statutory analyses and determinations of legislative intent are not conclusive in resolving the question whether the Privacy Act is an Exemption 3 statute. Examination of the practical operation of the two acts under each alternative may yield the interpretation most consistent with the legislative intent of both statutes.

II. OPERATION OF THE FOIA AND THE PRIVACY ACT

A. *Analyzing the Privacy Act as an Exemption 3 Statute*

Designation of the Privacy Act as an Exemption 3 statute requires a distinction to be drawn between application of the Privacy Act exemptions to only the subject of a file or to all requesters.⁵⁵ The Privacy

52. *Greentree v. United States Customs Serv.*, 674 F.2d 74, 83 (D.C. Cir. 1982); see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797, 798 (3d Cir. 1983). See *supra* note 32 and accompanying text.

53. 120 Cong. Rec. 40,406, 40,882 (1974). The status quo, which the consent waiver was to maintain, was disclosure under the FOIA to "any person"—first- and third-party requesters alike—without "plac[ing] the Privacy Act in the path of 'any person' seeking access to information under FOIA." *Greentree v. United States Customs Serv.*, 674 F.2d 74, 83 n.23 (D.C. Cir. 1982); see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 798 (3d Cir. 1983). *Contra Shapiro v. DEA*, 721 F.2d 215, 220, 223 (7th Cir. 1983) ("status quo" at time of enactment of Privacy Act gave third parties very little access to personal files), *cert. granted*, 104 S. Ct. 1706 (1984); *Misinterpretation*, *supra* note 7, at 526 & n.175 (consent waiver does no more than waive consent if FOIA requires disclosure, it does not determine whether Privacy Act exemptions bar FOIA disclosure).

54. *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982); accord *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983).

55. See *Government Information*, *supra* note 3, at 1339; *Misinterpretation*, *supra* note 7, at 530-31. This distinction has not been drawn by the courts that apparently would restrict the application of the Privacy Act as an Exemption 3 statute to first-party requesters. See *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983) (third parties have access under FOIA notwithstanding Privacy Act exemptions), *cert. granted*, 104 S. Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 691 n.3 (5th Cir. 1980) (Privacy Act is Exemption 3 statute yet court does not address scope of exemption). The *Terkel* court did not expressly designate the Privacy Act as an Exemption 3 statute, but merely stated that the FOIA and the Privacy Act must be considered together, and that material exempted by the Privacy Act should be withheld under the FOIA. *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). Thus, it is unclear whether that court would rule that the Privacy Act prevents third- as well as first-party requesters from obtaining information exempted under the Privacy Act.

Act applies only to first-party requesters.⁵⁶ Exemption 3, therefore, may incorporate the Privacy Act exemptions only as to first-party requesters.⁵⁷ The FOIA, however, applies to "any person."⁵⁸ Thus, once Privacy Act exemptions are incorporated into the FOIA, they may be applied to all persons despite the application of the Privacy Act only to the subject of a file.⁵⁹ The operation of the Privacy Act as an Exemption 3 statute depends upon which requesters are subject to the Privacy Act exemptions.

1. The Incorporated Privacy Act Exemptions Applied Only to First-Party Requesters

If Exemption 3 incorporates Privacy Act exemptions only as to first-party requesters, the limited incorporation creates what has been termed the third-party anomaly.⁶⁰ Third parties may receive more information about an individual under the FOIA than that individual could obtain under either the Privacy Act or the FOIA with incorporated Privacy Act exemptions.⁶¹ The problem arises because of the differences between the disclosure provisions of the two acts. FOIA exemptions concerning personal information require that disclosure decisions utilize a balancing test on a case-by-case basis.⁶² The agency

56. See *supra* note 5.

57. This is the approach taken by those holding the Privacy Act an Exemption 3 statute. See *supra* note 55.

58. 5 U.S.C. § 552(a) (1982).

59. *Government Information*, *supra* note 3, at 1339; *Misinterpretation*, *supra* note 7, at 530-31. The FOIA does not consider personal interests or motivations in its disclosure determinations; its access provisions as well as exemptions apply to "any person." *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *Hawkes v. IRS*, 467 F.2d 787, 790 n.3 (6th Cir. 1972); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971); see H.R. Rep. No. 1419, 92d Cong., 2d Sess. 76-77 (1972); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News 2418, 2418; S. Rep. No. 813, 89th Cong., 1st Sess. 5-6 (1965), reprinted in FOIA Source Book, *supra* note 45, at 40-41.

60. See *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-80 (D.C. Cir. 1982); *Misinterpretation*, *supra* note 7, at 530 n.205; Letter from Senator Edward M. Kennedy to United States Attorney General Edward Levi (Aug. 26, 1975), reprinted in 121 Cong. Rec. 32,890-91 (1975).

61. *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983), cert. granted, 104 S. Ct. 1706 (1984); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 795 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-80 (D.C. Cir. 1982).

62. *Government Information*, *supra* note 3, at 1336-37; see *Department of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976); *Getman v. NLRB*, 450 F.2d 670, 677 n.24 (D.C. Cir. 1971). In the absence of an applicable exemption, the court has no power to prevent disclosure. *Washington Post Co. v. United States Dep't of State*, 685 F.2d 698, 700 (D.C. Cir. 1982), vacated as moot, 104 S. Ct. 418 (1983); *Getman v. NLRB*, 450 F.2d 670, 678 (D.C. Cir. 1971); see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220-21 (1978); *Williams v. FBI*, 730 F.2d 882, 884 (2d Cir. 1984).

must weigh the potential harm of disclosure to the government or individual⁶³ against the public interest in disclosure.⁶⁴ The FOIA also has a provision for the release of segregable portions of requested information if all of the information need not be disclosed.⁶⁵ The Privacy Act has no balancing test and no provision for the release of segregable portions of requested information.⁶⁶ If the information is contained in the types of files that have been prospectively exempted, the information need not be released.⁶⁷ Therefore, it is possible that a specific record exempt under the Privacy Act would be available in whole or in part under the FOIA.

All Central Intelligence Agency (CIA) records, for example, are exempt from disclosure under the Privacy Act.⁶⁸ Thus, the first-party requester would never have access to CIA records.⁶⁹ Under the FOIA, however, CIA records are exempt only to the extent provided by the FOIA's exemptions.⁷⁰ In particular, Exemption 7 withholds investiga-

63. The individual may be either the subject of a file or any person mentioned in the file. Freedom of Information Act and Amendments of 1974, Source Book 333 (Comm. Print 1975); see *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

64. See, e.g., *Department of Air Force v. Rose*, 425 U.S. 352, 369-70 (1976) (weighing potential harm to government and concerned individuals against public interest in disclosure); *Antonelli v. FBI*, 721 F.2d 615, 619 (7th Cir. 1983) (weighing privacy interest against public interest in disclosure); see 5 U.S.C. § 552(b)(6) (1982) (personnel and medical files), *id.* § 552(b)(7) (investigatory records).

65. 5 U.S.C. § 552(b) (1982).

66. The Privacy Act "does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly . . ." *Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); see 5 U.S.C. § 552a (j), (k) (1982).

67. See *Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984). See *supra* note 16 and accompanying text.

68. 5 U.S.C. § 552a(j)(1) (1982). This section provides that:

The head of any agency may promulgate rules . . . to exempt any system of records within the agency from any part of this section . . . if the system of records is—(1) maintained by the Central Intelligence Agency . . .

Id.

69. The operation of Exemption 3 is similar to that of the Privacy Act exemptions in that "the sole issue for decision is the existence of a relevant statute and inclusion of the withheld material within that statute's coverage." *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

70. 5 U.S.C. § 552(b)(1)-(9) (1982). CIA records have additional protection from disclosure for information regarding intelligence sources and methods. 50 U.S.C. § 403(d)(3), (g) (1976). Section 403(d)(3) and (g) are Exemption 3 withholding statutes. *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Weissman v. CIA*, 565 F.2d 692, 694 (D.C. Cir. 1977). The CIA may not, however, "refuse to provide any information at all about anything it does." *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976).

tive records that would harm either the government or an individual.⁷¹ Specifically, it withholds investigative records that would jeopardize an enforcement proceeding or the right to a fair trial,⁷² would reveal the source of confidential information,⁷³ would reveal secret investigative techniques,⁷⁴ would endanger the life or safety of law enforcement personnel,⁷⁵ or would result in an invasion of privacy.⁷⁶ If the record or a portion thereof does not violate one of these provisions, it must be disclosed to the third-party requester.⁷⁷ The first party's access, however, is barred by the Privacy Act's blanket exemption, an absurd result.

Those supporting Exemption 3 status for the Privacy Act dismiss the potential effect of the third party anomaly⁷⁸ as unlikely to occur with any frequency.⁷⁹ The infrequency of occurrence, however, should not support an interpretation that creates this anomaly.⁸⁰ The mere possibility that a member of the general public could obtain information about an individual, that the individual himself could not, is inconsistent with the Privacy Act's main purpose—to protect the individual's privacy.⁸¹ It would be ironic to interpret the Privacy Act to allow greater dissemination of personal information to the public than to the concerned individual.⁸²

71. 5 U.S.C. § 552(b)(7) (1982); see *FBI v. Abramson*, 456 U.S. 615, 627 (1982); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 229-30 (1978); *Williams v. FBI*, 730 F.2d 882, 885-86 (2d Cir. 1984).

72. 5 U.S.C. § 552(b)(7)(A), (B) (1982).

73. *Id.* § 552(b)(7)(D).

74. *Id.* § 552(b)(7)(E).

75. *Id.* § 552(b)(7)(F).

76. *Id.* § 552 (b)(7)(C).

77. See *supra* note 62 and accompanying text.

78. See *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 690 (5th Cir. 1980); *Misinterpretation*, *supra* note 7, at 530-31.

79. *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); see also *Painter v. FBI*, 615 F.2d 689, 690 (5th Cir. 1980) (acknowledges anomaly but concludes that Privacy Act is an Exemption 3 statute); cf. *Misinterpretation*, *supra* note 7, at 530-31 (third party anomaly should be solved by applying Privacy Act exemptions to all requesters).

80. See *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-80 (D.C. Cir. 1982) (court confronted with "rare case" holds that because of anomaly Congress could not have intended Privacy Act to be an Exemption 3 statute). This is consistent with the rule that when the language of a statute is subject to differing interpretations, the words should be construed to produce a rational result. 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 45.12 (4th ed. 1973); see *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977).

81. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982). See *supra* note 46 and accompanying text.

82. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79-80 (D.C. Cir. 1982).

Further, designating the Privacy Act as an Exemption 3 statute to be applied only to the subject of the file may not always prevent his access to material exempt under the Privacy Act. The first-party requester may circumvent Exemption 3 by requesting information through a third party.⁸³ Thus, Privacy Act exemptions could be undermined even if the Privacy Act were designated an Exemption 3 statute but applied only to the first-party requester.⁸⁴ If the primary rationale behind applying the Privacy Act as an Exemption 3 statute is to maintain the effectiveness of the Privacy Act exemptions, these exemptions must be applied to all requesters.⁸⁵

2. The Incorporated Privacy Act Exemptions Applied to all Requesters

If the Privacy Act exemptions are applied through Exemption 3 to all requesters, the third-party anomaly is avoided because both first and third parties would have equal access.⁸⁶ Other problems arise, however, that affect the scope of disclosure under the FOIA.

Applying Privacy Act exemptions to all requesters reduces disclosure under the FOIA.⁸⁷ All CIA records, for example, are completely

83. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 795-96 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79, 80 (D.C. Cir. 1982). Consent by the subject of the file may accomplish release of information to the public even if the information would not have been available under the Privacy Act, or would be an invasion of privacy under FOIA provisions. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 795 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 80 (D.C. Cir. 1982); *Rushford v. Civiletti*, 485 F. Supp. 477, 479 (D.D.C. 1980) (dictum).

84. See *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982). The third-party anomaly enables third parties to obtain information that the individual could not. See *supra* notes 60-67 and accompanying text. The individual would undoubtedly obtain the information because if the information were available to the public, "how could it be kept from the party whom it concerned?" *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982).

85. *Misinterpretation*, *supra* note 7, at 531. If the first-party requester ought never to have access to information exempted under the Privacy Act, this material must be withheld under the FOIA because the first-party could otherwise gain access through a third party. See *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982) (court acknowledges that first-party requesters could circumvent Privacy Act exemptions and holds Privacy Act not an Exemption 3 statute); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (FOIA cannot compel release of information exempt under the Privacy Act), *cert. denied*, 444 U.S. 1013 (1980). But see *Government Information*, *supra* note 3, at 1338 (Privacy Act does not require that certain records be kept confidential from the subject, it allows exemption from its own subject access requirement).

86. First and third parties would have equal access because both are subject to the Privacy Act exemptions as incorporated into the FOIA. See *Misinterpretation*, *supra* note 7, at 530-31.

87. See *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983). But see *Shapiro v. DEA*, 721 F.2d 215, 222-23 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984).

exempt from disclosure under the Privacy Act;⁸⁸ incorporating Privacy Act exemptions into the FOIA would include this total exemption. CIA records, however, may be disclosed under the FOIA⁸⁹ if the information does not fall within one of the FOIA exemptions.⁹⁰ There is no indication that Congress intended to insulate the CIA completely by enacting the Privacy Act.⁹¹ Thus, this interpretation goes beyond legislative intent.

Incorporating Privacy Act exemptions for investigatory records would further undermine the FOIA's Exemption 7 when applied to non-CIA investigatory records. The Privacy Act's exemptions are predicated on the nature of the records.⁹² If the records are investigatory in nature and compiled for law enforcement purposes, the records may be exempted.⁹³ By contrast, Exemption 7 bases its determination on the nature of the records' contents.⁹⁴ The blanket exemptions under the Privacy Act that enable agencies to withhold entire systems of records would preempt the case-by-case approach of Exemption 7.⁹⁵

Preempting the utilization of Exemption 7's disclosure test through the incorporation of these two Privacy Act exemptions would repeal Exemption 7 by implication.⁹⁶ The disclosure test in Exemption 7 was

88. 5 U.S.C. § 552a(j)(1) (1982).

89. See *supra* notes 19, 70 and accompanying text.

90. See *supra* note 62. The CIA's Exemption 3 withholding statutes do not provide complete immunity from disclosures. See *supra* note 70. Further, Congress is currently considering a bill that would broaden CIA disclosure exemptions, yet does not contemplate removing all CIA records from disclosure. See Statement of Mary C. Lawton, Counsel for Intelligence Policy, U.S. Dep't of Justice, Before House Permanent Select Comm. on Intelligence, on H.R. 3460 and H.R. 4431 (available in files of *Fordham Law Review*).

91. If Congress' intent is to insulate all CIA records from disclosure, proposed H.R. 3460 and H.R. 4431 are meaningless because CIA records are already exempt.

92. See *supra* note 16 and accompanying text.

93. See 5 U.S.C. § 552a(j)(2), (k)(2) (1982).

94. See *supra* note 62 and accompanying text.

95. The factual determination of the contents of the requested file, required by Exemption 7, is not necessary when dealing with a valid Exemption 3 statute. *Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980).

96. See *Provenzano v. United States Dep't of Justice*, 717 F.2d 799, 800 (3d Cir. 1983) (*per curiam*), *cert. granted*, 104 S. Ct. 1706 (1984); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 83-84 (D.C. Cir. 1982).

The original Exemption 7 permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Pub. L. No. 89-487, 80 Stat. 250, 251 (1966). Exemption 7 was amended in 1974. Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1563-64 (1974) (codified as amended at 5 U.S.C. § 552(b)(7) (1982)). See *supra* note 19. The statute was amended because judicial interpretation of the original Exemption withheld almost all law enforce-

included by an amendment enacted to broaden disclosures of investigatory records⁹⁷ and passed while Congress was considering the Privacy Act.⁹⁸ It is unlikely that Congress would amend Exemption 7 to broaden disclosure, only to repeal the amendment a few weeks later when the Privacy Act was enacted.⁹⁹

Applying Privacy Act exemptions to "any person" who requests information under the FOIA avoids the problems that arise when the application is limited to first-party requesters. If the Privacy Act is rationally to be construed as an Exemption 3 statute, its exemptions must be applied through the FOIA to all requesters. This interpretation, however, seriously delimits the scope of disclosure under the FOIA, thus frustrating Congressional intent that the FOIA compel disclosure unless the information falls within narrowly drawn exemptions.

B. *Analyzing the Privacy Act as an Independent Statute*

When the Privacy Act operates independently of the FOIA, it is also possible to distinguish between first- and third-party requesters in determining which statute may be used to obtain access. By its terms,

ment records. 120 Cong. Rec. 17,033 (1974) (statement of Sen. Hart); *see, e.g.*, *Ditlow v. Brinegar*, 494 F.2d 1073, 1074 (D.C. Cir.) (per curiam) (irrelevant that disclosure would not harm government), *cert. denied*, 419 U.S. 974 (1974); *Aspin v. Department of Defense*, 491 F.2d 24, 30 (D.C. Cir. 1973) (termination of investigation or enforcement proceeding does not affect withholding decision); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195, 1202 (D.C. Cir. 1973) (classification of information as investigatory not subject to appellate review), *cert. denied*, 416 U.S. 993 (1974); *see also* 120 Cong. Rec. 17,033-34 (1974) (statement of Sen. Hart) (broad interpretation of Exemption 7 is inconsistent with FOIA's disclosure purpose).

97. The word "file" in the original Exemption 7 was changed to "record" in order to require a review of the contents of the file before exemption is permitted. *Compare* Pub. L. No. 93-502, § 2(b), 88 Stat. 1561, 1563-64 (1974) (codified as amended at 5 U.S.C. § 552(b)(7)) ("records") *with* Pub. L. No. 89-487, 80 Stat. 250, 251 (1966) ("files"). *Williams v. FBI*, 730 F.2d 882, 884 (2d Cir. 1984); *see NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 229-30 (1978). Further, exemption is permitted for only those files the contents of which are covered by the six categories specified in Exemption 7. *FBI v. Abramson*, 456 U.S. 615, 627 (1982); *Williams v. FBI*, 730 F.2d 882, 884 (2d Cir. 1984). *See supra* note 62.

98. 120 Cong. Rec. 36,645 (1974) (remarks of Rep. Erlenborn) (noting that Privacy Act came to the floor the same day Exemption 7 was amended over presidential veto); *see Greentree v. United States Customs Serv.*, 674 F.2d 74, 83, 88 (D.C. Cir. 1982); *Duffin v. Carlson*, 636 F.2d 709, 711 (D.C. Cir. 1980). *But see Shapiro v. DEA*, 721 F.2d 215, 222 (7th Cir. 1983) (Congress would not provide broad nondisclosure provisions in the Privacy Act and intend that they be bypassed by the recently expanded Exemption 7), *cert. granted*, 104 S. Ct. 1706 (1984).

99. Repeal by implication is not favored. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 84 (D.C. Cir. 1982).

the Privacy Act would remain applicable only to first-party requesters.¹⁰⁰ The FOIA, on the other hand, may apply either to all requesters or only to third-party requesters.¹⁰¹

If the Privacy Act is not characterized as an Exemption 3 statute, first-party requesters may be limited to access under the Privacy Act.¹⁰² This, however, produces the third-party anomaly because third parties have access to the more liberal FOIA disclosure provisions.¹⁰³

Alternatively, the first-party requester may request the records under the Privacy Act or the FOIA.¹⁰⁴ This approach eliminates the third-party anomaly, as both first and third parties would have equal access. Additionally, FOIA disclosure provisions would not be limited by incorporation of the broader Privacy Act exemptions.¹⁰⁵ Allowing a first-party requester to avoid Privacy Act exemptions by making a request under the FOIA, however, limits the effectiveness of Privacy Act exemptions.¹⁰⁶

The exemptions to the Privacy Act were included in recognition that certain types of files are not appropriately released to the subject of the file.¹⁰⁷ Thus, use of the FOIA to disclose Privacy Act-exempted

100. 5 U.S.C. § 552a(d) (1982).

101. The FOIA, however, applies to "any person," a term that should not exclude first-party requesters. *See* *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983). *See supra* note 59 and accompanying text.

102. This was the position taken by the Office of Management and Budget, *see* OMB Report, 40 Fed. Reg. 56,741, 56,742 (1975), and by the Justice Department, *see* 28 C.F.R. § 16.57 (1983); Letter from Deputy Assistant Att'y Gen. Mary C. Lawton to Meade Whitaker, Chief Counsel, Internal Revenue Service (July 30, 1975), *reprinted in* 121 Cong. Rec. 32,889-90 (1975). *Porter* held that first-party requesters are not limited to Privacy Act provisions. *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983). *But see Misinterpretation, supra* note 3, at 527 ("[N]othing in [congressional] debates indicates that Congress intended to allow individuals to obtain their investigatory records through means other than the access provisions of the Privacy Act.").

103. *See supra* note 61 and accompanying text.

104. *See Provenzano v. United States Dep't of Justice*, 717 F.2d 799, 800 (3d Cir. 1983) (per curiam), *cert. granted*, 104 S. Ct. 1706 (1984); *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982).

105. *See supra* note 86 and accompanying text.

106. *Shapiro v. DEA*, 721 F.2d 215, 221 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *see Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

107. 1974 Senate Report, *supra* note 13, at 23 ("[I]t would not be appropriate to allow individuals to see their own intelligence or investigative files."), *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6938; H.R. Rep. No. 1416, 93d Cong., 2d Sess. 18 (1974); 1974 House Report, *supra* note 44, at 18 (Broad CIA and investigative records exemptions are "permissible . . . because [such records] contain particularly sensitive information.").

information to a first-party requester may contravene the legislative intent underlying the Privacy Act.¹⁰⁸ The Privacy Act, however, was intended to protect the individual from government invasions of privacy.¹⁰⁹ Thus, the individual is afforded greater access, in some instances, under the Privacy Act than under the FOIA.¹¹⁰

The Privacy Act exemptions represent Congress' unwillingness to extend the additional access of the Act to the types of materials indicated in the exemptions, rather than an intent to withhold those materials completely.¹¹¹ The individual is granted a right under the Privacy Act to challenge the contents of the files.¹¹² Further, the Privacy Act dictates the manner in which agencies must obtain, verify and store personal information.¹¹³ This framework enables an individual to monitor the information collected, maintained, and disseminated about him,¹¹⁴ thus preventing governmental intrusions into his privacy.

108. *Shapiro v. DEA*, 721 F.2d 215, 221 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); *Painter v. FBI*, 615 F.2d 689, 690-91 (5th Cir. 1980); *see Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Misinterpretation*, *supra* note 7, at 527-28.

109. *See supra* note 46 and accompanying text.

110. *Greentree v. United States Customs Serv.*, 674 F.2d 74, 80-81 (D.C. Cir. 1982); *see Government Information*, *supra* note 3, at 1336-37. *See supra* notes 15, 46 and accompanying text. An individual will have greater access under the Privacy Act than would "any person" under the FOIA if the record he requested was not in a system of records which had not been exempted prior to the request. *See Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); 5 U.S.C. § 552a(j), (k) (1982); *see, e.g.*, 28 C.F.R. §§ 16.71-103 (1983) (agency regulations exempting systems of records under the Privacy Act). Additionally, under the FOIA, the identity of the requester is not considered when making disclosure decisions. *Robles v. EPA*, 484 F.2d 843, 847 (4th Cir. 1973); *see Hawkes v. IRS*, 467 F.2d 787, 790 n.3 (6th Cir. 1972); *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971). Under FOIA access provisions, a first-party requester has the same right to information about himself as would "any person" requesting the same file. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Moorefield v. United States Secret Serv.*, 611 F.2d 1021, 1023 n.2 (5th Cir.), *cert. denied*, 449 U.S. 909 (1980); *Cox v. United States Dep't of Justice*, 576 F.2d 1302, 1305 n.5 (8th Cir. 1978). Invasion of privacy determinations under Exemptions 6 and 7(C) of the FOIA must balance the public interest in disclosure against the interest in nondisclosure. *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The requester's personal interest will not enter into that balancing process. *Antonelli v. FBI*, 721 F.2d 615, 619 (7th Cir. 1983); *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981).

111. *See Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983); *Greentree v. United States Customs Serv.*, 674 F.2d 74, 81 (D.C. Cir. 1982); *Government Information*, *supra* note 3, at 1338.

112. 5 U.S.C. § 552a(d)(2), (3), (4) (1982).

113. *Id.* § 552a(d), (e).

114. *See id.* § 552a(g)(1). Although § 552a(i) provides criminal penalties for agency violations of the Privacy Act, enforcement of the Privacy Act is generally left to the injured first-party requester. The addition of a civil remedy was one of the improvements afforded by the FOIA when it amended the Administrative Procedure

On the other hand, if the Privacy Act's main purpose is to ensure that its exemptions prevent any first-party access to exempted material, the Privacy Act's exemptions must be incorporated into the FOIA and applied to all requesters.¹¹⁵ This, however, undermines FOIA disclosure.¹¹⁶ Clearly, a choice must be made as to which statute is to take precedence.

The independent operation of the Privacy Act, in combination with FOIA access for all requesters, is consistent with the primary purposes of both the FOIA and the Privacy Act.¹¹⁷ Moreover, such a holding is not inconsistent with the Privacy Act's exemptions.¹¹⁸ The use of FOIA access provisions by first-party requesters is not a guarantee of disclosure.¹¹⁹ There are a number of obstacles under the FOIA that prevent access to information which should not be disclosed. The information that is not disclosed under the FOIA is similar to the type of information exempted by the Privacy Act.¹²⁰ The information that would be disclosed under the FOIA, but exempted under the Privacy Act, is information that Congress has determined to be properly disclosed to the public. The first-party requester should not be distinguished from the general public and, therefore, the information should also be available to him.

For example, the FOIA may not be used as a discovery tool.¹²¹ First-party requesters have been denied access to investigatory records

Act, ch. 324, 60 Stat. 237, 238 (1946). Civil litigation was intended to enforce the FOIA. See S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965), *reprinted in* FOIA Source Book, *supra* note 45, at 43; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 1-5, 9, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2418, 2426.

115. See *supra* note 85 and accompanying text.

116. FOIA case-by-case disclosure decisions would be preempted, resulting in a repeal by implication of FOIA exemptions. See *supra* note 96 and accompanying text.

117. *Greentree v. United States Customs Serv.*, 674 F.2d 74, 88 (D.C. Cir. 1982); see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983). See *supra* note 46 and accompanying text.

118. *Greentree v. United States Customs Serv.*, 674 F.2d 74, 88 (D.C. Cir. 1982); see *Porter v. United States Dep't of Justice*, 717 F.2d 787, 797 (3d Cir. 1983). See *infra* notes 121-28 and accompanying text. But see *Misinterpretation*, *supra* note 7, at 531.

119. Third parties do not often have access under the FOIA to information that would be withheld from the first-party requester under the Privacy Act. *Shapiro v. DEA*, 721 F.2d 215, 223 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984); see *Greentree v. United States Customs Serv.*, 674 F.2d 74, 80, 88 (D.C. Cir. 1982). If a third party would not have access, however, neither should the first party, as the information should not be available to "any person." *Greentree*, 674 F.2d at 83 n.23. See *supra* note 59 and accompanying text.

120. See *Government Information*, *supra* note 3, at 1337 (disclosure decisions made under FOIA rather than Privacy Act because Privacy Act contains provisions exempting required FOIA disclosures from Privacy Act requirements).

121. "The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery." *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14

concerning themselves before, during, and to some extent, after an investigation.¹²² The Privacy Act exemptions for investigatory records are directed towards withholding the same type of materials.¹²³ Moreover, the first-party requester may not have greater access under the FOIA even when FOIA disclosure decisions are based on protection of the privacy interest because the privacy interest is not necessarily only that of the subject of the file.¹²⁴ FOIA's Exemption 6, for example, exempts personnel files if disclosure would constitute a "clearly unwarranted invasion of personal privacy."¹²⁵ The corresponding Privacy Act exemptions permit the withholding of all personnel files that relate to employment or promotion decisions, but "only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence"¹²⁶ Although access to this type of information under the FOIA may not constitute an unwarranted invasion of the requester's privacy,¹²⁸ revealing the identity of a confidential source of informa-

(1982); see *Antonelli v. FBI*, 721 F.2d 615, 619 (7th Cir. 1983); *Stein v. United States Dep't of Justice*, 662 F.2d 1245, 1260 (7th Cir. 1981); *Brown v. FBI*, 658 F.2d 71, 75 (2d Cir. 1981); S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974), reprinted in House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974* (P.L. 93-502) Source Book at 171 (Comm. Print 1975).

122. Investigatory records are exempt under Exemption 7 if their disclosure would interfere with an enforcement proceeding or deprive a person of a fair and impartial adjudication. 5 U.S.C. § 552(b)(7)(A), (B) (1982). These exemptions permit the withholding of information before and during an investigation or enforcement proceeding. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 241 (1978); *United States v. Murdock*, 548 F.2d 599, 601-03 (5th Cir. 1977); *Fruehauf Corp. v. Thornton*, 507 F.2d 1253, 1254 (6th Cir. 1974). Several courts have withheld information even after the investigation or enforcement proceeding. See, e.g., *Antonelli v. FBI*, 721 F.2d 615, 618, 619 (7th Cir. 1983); *Stein v. United States Dep't of Justice*, 662 F.2d 1245, 1261 (7th Cir. 1981); *Brown v. FBI*, 658 F.2d 71, 75-76 (2d Cir. 1981).

123. 5 U.S.C. § 552a(j), (k) (1982); see *United States v. Murdock*, 548 F.2d 599, 601-03 (5th Cir. 1977) (neither the Privacy Act nor the FOIA provide supplemental discovery rights).

124. *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) cert. denied, 444 U.S. 1013 (1980); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978). See *supra* note 111 and accompanying text.

125. 5 U.S.C. § 552(b)(6) (1982).

126. *Id.* § 552a(k)(5) (employment decisions), (7) (promotions).

127. *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978); cf. S. Conf. Rep. No. 1200, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 6285, 6292 (in the context of amending FOIA's Exemption 7 the Conference Committee noted that "disclosure of information about a person to that person does not constitute an invasion of privacy").

128. See *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979) (invasion of source's right to privacy warrants withholding information under Exemption 7), cert. denied, 444 U.S. 1013 (1980); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir. 1978) (same); Attorney General's Memorandum on the 1974 Amendments to the Freedom

tion may be an invasion of the source's privacy right. Thus, the information could be withheld under Exemption 6.

Some material that is exempt under the Privacy Act, however, may be disclosed under the FOIA.¹²⁹ This is a result of the Privacy Act's broader exemptions, which are made on the basis of the nature of the file, rather than on the contents.¹³⁰ The breadth of the Privacy Act exemptions eases disclosure decisions and other administrative requirements imposed by the Act, but may encompass material that could be disclosed harmlessly.¹³¹ The FOIA's exemptions withhold information whose disclosure would harm the government. Because the FOIA mandates disclosure of non-exempt files to "any person," the Privacy Act should not operate to withhold harmless information from any person unless Congress has unequivocally so stated.

CONCLUSION

Analysis of the statutory language and legislative intent is not determinative in resolving whether the Privacy Act impairs FOIA disclosure. A major issue that must be resolved is the identification of the policies underlying the two acts. After these policies have been determined, it becomes simple to resolve whether the Privacy Act is an Exemption 3 statute, whether first-party access is limited to Privacy Act provisions, or whether the Privacy Act may in any other way impair FOIA disclosure. The alternative policies should be based upon allowing all requesters equal access to government information, as it is absurd to allow third-party requesters to obtain more information about an individual than could the individual himself. Thus, the real dispute is whether the Privacy Act amends the FOIA's mandate of broad disclosure to mirror the Privacy Act's blanket exemptions, or whether the Privacy Act is a grant of additional rights to first-party requesters and the exemptions merely boundaries limiting that grant. Incorporating Privacy Act exemptions into the FOIA necessarily implies that Congress intended to drastically limit FOIA disclosure of government information. Congress, however, has consistently maintained a policy of broad disclosure and has repeatedly rejected the

of Information Act (1975), *reprinted in* House Comm. on Government Operations and Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book 119 (Comm. Print 1975) (language of Exemption 7 invasion of privacy provision is virtually identical to that of Exemption 6 and determinations of invasion of privacy will be similar in both cases).

129. See *supra* note 61 and accompanying text.

130. See *supra* note 66 and accompanying text.

131. See *Shapiro v. DEA*, 721 F.2d 215, 218 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 1706 (1984).

blanket application of FOIA exemptions. Because there is no express indication that the Privacy Act was intended to either narrow FOIA disclosure or to impose blanket FOIA exemptions, the logical conclusion is that the Privacy Act should not be construed to do so. Rather, the Privacy Act should be characterized as an additional grant of privacy safeguards to the individual, having no effect on FOIA disclosure either to first- or third-party requesters. Thus, the Privacy Act is neither an Exemption 3 statute, nor does it restrict first-party requesters to its access provisions.

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